EXHIBIT 2
DATE 2/7/2013
HB 374

FILED
March 16 2012
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 12-0171

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SEVEN MONTANA LEGISLATORS,

Petitioners,

v.

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY, Honorable James P. Reynolds, Presiding,

Respondent.

ORDER

Before this Court is a Petition for Writ of Supervisory Control (Petition) filed by seven Montana legislators (Legislators) in relation to *Reichert v. State of Montana*, Cause No. DDV-2011-1086, in the First Judicial District Court, Lewis and Clark County. The Petition, filed March 15, 2012, challenges a ruling by the District Court denying Legislators' motion to intervene as party defendants. Legislators contend that the District Court's order denying intervention is a mistake of law that will cause a gross injustice if it is not corrected. Legislators therefore ask this Court to exercise supervisory control and to reverse the District Court's ruling. For the reasons which follow, we accept supervisory control and affirm the District Court's decision.

BACKGROUND

Arlene Reichert and various other individuals (Plaintiffs) are citizens, taxpayers, and electors of Montana who commenced this action in the District Court challenging a legislative referendum that is presently scheduled to appear on the June 2012 primary election ballot. The 62nd session of the Montana Legislature enacted Senate Bill 268, submitting to the electorate the question whether certain statutory changes should be made

regarding the election of Montana Supreme Court justices. The seven justices are presently elected on a statewide basis. SB 268 would require that they be elected from seven specified districts. Moreover, the chief justice is currently elected to that position in the same manner as the six associate justices are elected to their positions, i.e., in a statewide election. SB 268 would require that the chief justice be selected by the majority vote of the seven justices. SB 268 was passed by both houses of the Legislature and was filed with the Secretary of State. It is to appear on the primary election ballot as legislative referendum 119 (LR-119).

Plaintiffs filed this action on November 23, 2011, seeking a declaratory judgment that LR-119 is invalid. They also seek an injunction directing the State to decertify LR-119 and to cease and desist from placing LR-119 on the ballot. The State, through the Attorney General, filed an answer on January 3, 2012. The answer includes responses to the specific allegations of the complaint and asserts two affirmative defenses. On January 18, Plaintiffs filed a motion for summary judgment, together with a supporting brief and affidavits.

Meanwhile, Legislators moved to intervene in the action on January 9. The Attorney General opposed their intervention. Plaintiffs did not state a position on the matter. Although M. R. Civ. P. 24(c) requires that a motion to intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought," Legislators did not file an answer with their motion. They filed a belated answer on January 30.

The District Court issued its order denying intervention on February 28. The court stated that Legislators could appear as amicus curiae and asked Legislators to advise the court of their desire in this regard within ten days. The District Court scheduled a hearing on Plaintiffs' motion for summary judgment for March 14.

On March 9, Legislators filed in this Court a notice of appeal of the District Court's decision. Plaintiffs responded with a motion to dismiss and a motion to expedite ruling. Plaintiffs explained that the Secretary of State will begin the ballot and voter information packet layout preparation on March 22 when the ballot is certified. Plaintiffs stated that, in light of certain statutory deadlines set forth in §§ 13-27-410 and 13-21-210, MCA, this matter would be difficult to resolve on time if the summary judgment hearing were not

permitted to go forward, as scheduled, on March 14. This Court provided the Attorney General and Legislators the opportunity to file responses to Plaintiffs' motion to dismiss. Both the Attorney General and Legislators indicated in their filings that they did not oppose dismissal of the appeal.[1] Legislators stated that they intended instead to file the instant Petition. On March 13, this Court granted Plaintiffs' motion to dismiss Legislators' appeal.

The District Court, the Honorable James P. Reynolds presiding, held the summary judgment hearing on March 14. Legislators state that their counsel listened to the proceeding telephonically but was not addressed at the hearing or invited to speak. Legislators further state that Judge Reynolds indicated he would issue a ruling by March 20. Legislators request that we direct Judge Reynolds to grant them intervention and allow them to file and serve electronically a response to the issues raised at the summary judgment hearing by 9:00 a.m. March 19.

DISCUSSION

I. Supervisory Control

As a general rule, an order denying a motion to intervene is not separately appealable under M. R. App. P. 6. The time to appeal from such an interlocutory order is after entry of final judgment. *Sportsmen for I-143 v. Mont. Fifteenth Jud. Dist. Ct.*, 2002 MT 18, ¶ 5, 308 Mont. 189, 40 P.3d 400; *DeVoe v. State*, 281 Mont. 356, 362-63, 935 P.2d 256, 260 (1997).

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[1] In response to this Court's order granting Legislators the opportunity to file a response to Plaintiffs' motion, Legislators filed a document captioned "Withdrawal of Notice of Appeal." The Montana Rules of Appellate Procedure, however, do not recognize a "Withdrawal of Notice of Appeal." The Rules do recognize a motion to voluntarily dismiss an appeal. *See* M. R. App. P. 16(4). Yet, even deeming Legislators' "Withdrawal" document to be a motion under Rule 16(4), the motion was defective because the rule specifically states that "a party's motion to voluntarily dismiss that party's cause, appeal, or cross-appeal must be signed by *both the moving party and that party's counsel*" (emphasis added). Legislators' "Withdrawal" document was signed only by counsel. Furthermore, this Court has previously held that the filing of a document entitled "Withdrawal of Appeal" is not sufficient to divest this Court of jurisdiction. *In re M.L.Y.*, 201 Mont. 467, 471, 655 P.2d 499, 501 (1982). " 'Whether or not the appellant . . . will be permitted to dismiss or withdraw his appeal . . . is a matter within the discretion of the court, and not a matter of right on the part of the appellant . . . .' " *M.L.Y.*, 201 Mont. at 471, 655 P.2d at 501 (ellipses in original) (quoting 5 Am. Jur. 2d *Appeal and Error* § 920 (1962)).

This Court, however, may exercise supervisory control to immediately review an interlocutory order where (1) urgency or emergency factors exist making the normal appeal process inadequate, (2) the case involves purely legal questions, and (3) one or more of the following circumstances exist: (a) the other court is proceeding under a mistake of law and is causing a gross injustice, (b) constitutional issues of statewide importance are involved, or (c) the other court has granted or denied a motion for substitution of a judge in a criminal case. M. R. App. P. 14(3); *Lamb v. Fourth Jud. Dist. Ct.*, 2010 MT 141, ¶ 10, 356 Mont. 534, 234 P.3d 893; *Sportsmen for I-143*, ¶ 5.

Here, we conclude that the normal appeal process would be inadequate because of the upcoming statutory deadlines imposed on the Secretary of State. Appeal following final judgment in this case would come too late for Legislators. Moreover, the issues presented are purely legal. Finally, the question of Legislators' right to intervene in this action involves constitutional issues of statewide importance, as described below. Accordingly, we shall exercise supervisory control over this case.

II. Intervention

Rule 24 of the Montana Rules of Civil Procedure recognizes intervention as of right and permissive intervention, as follows:

> **(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by statute; or
>
> (2) claims an interest relating to the property or transaction which is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless the existing parties adequately represent that interest.
>
> **(b) Permissive Intervention.**
>
> (1) ***In General.*** On timely motion, the court may permit anyone to intervene who:
>
> (A) is given a conditional right to intervene by statute; or
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.

Rule 24 (c) provides that "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."

Here, Legislators do not claim a statutory right to intervene. They instead claim a right to intervene under subsection (a)(2). They also assert that permissive intervention is warranted under subsection (b)(1)(B). We review de novo the grant or denial of a motion to intervene as a matter of right under M. R. Civ. P. 24(a). *Loftis v. Loftis*, 2010 MT 49, ¶ 6, 355 Mont. 316, 227 P.3d 1030. We review for abuse of discretion the grant or denial of a motion for permissive intervention under M. R. Civ. P. 24(b). *Loftis*, ¶ 6.

As noted, Legislators are seven Montana legislators. One is identified as the primary sponsor of SB 268 (Senator Joe Balyeat); the others are identified as two senators and four representatives who supported SB 268 and voted for its passage. Legislators note that they are residents from each of the seven districts from which Supreme Court justices would be elected should LR-119 pass.

Throughout the Petition, Legislators repeatedly conflate their status as legislators with their status as private citizens. Legislators moved to intervene in this action in their capacity as legislators—i.e., as officials of state government. Yet, Legislators' arguments in support of intervention are premised on "their personal interests and personal rights as citizens and voters of Montana." Legislators' "personal rights as citizens," however, do not give them a right to intervene in their capacity as legislators. As explained below, intervention as legislators and intervention as private citizens are distinct matters. The District Court first considered Legislators' status as legislators, and then their interests as private citizens and residents of the proposed districts. We shall do the same.

A. Status as Legislators

As a general rule, individual legislators have standing to bring suit where they contend that an allegedly illegal action has completely nullified their votes—i.e., that a bill the legislators voted for (or against) would have become law (or not become law) if their vote had not been stripped of its validity. *See Planned Parenthood v. Ehlmann*, 137 F.3d 573, 577-78 (8th Cir. 1998) (discussing *Coleman v. Miller*, 307 U.S. 433, 59 S. Ct. 972 (1939), and *Raines v. Byrd*, 521 U.S. 811, 117 S. Ct. 2312 (1997)). This does not mean, however, that individual legislators who voted for an enactment can intervene in an action where a

party seeks to invalidate that enactment. *See Tarsney v. O'Keefe*, 225 F.3d 929, 939 (8th Cir. 2000) ("The general rule is that when a court declares an act of the state legislature to be unconstitutional, individual legislators who voted for the enactment have no standing to intervene." (brackets and internal quotation marks omitted)); *Am. Assn. of People with Disabilities v. Herrera*, 257 F.R.D. 236, 251 (D.N.M. 2008) ("Legislators do not have, under the case law, standing by virtue of voting for a piece of legislation, and given the link between standing and protectable interests, voting for a bill alone will not create a protectable interest absent unusual circumstances."); *Roe v. Casey*, 464 F. Supp. 483, 486 (E.D. Pa. 1978) (where the cosponsor of challenged state laws sought intervention in order to ensure that the laws were properly interpreted by and defended before the court, the court concluded that the legislator did not have sufficiently substantial, direct, or legally protectable interests to warrant intervention; the issue before the court was not whether the laws had been duly and lawfully enacted, but whether the laws improperly conflicted with a federal statute or the United States Constitution), *aff'd*, 623 F.2d 829, 832 n. 7 (3d Cir. 1980).

In *Newdow v. United States Cong.*, 313 F.3d 495 (9th Cir. 2002), the Court of Appeals concluded that the United States Senate did not have standing to intervene in every case where the constitutionality of a federal statute is challenged.

> Once the Senate has approved a proposed bill, the House of Representatives agrees, and the President has signed the measure, it becomes public law. A public law, after enactment, is not the Senate's any more than it is the law of any other citizen or group of citizens in the United States. It is a law of the United States of America, and the government is already represented in this case by the Attorney General. Of course, every time a statute is not followed or is declared unconstitutional, the votes of legislators are mooted and the power of the legislature is circumscribed in a sense, but that is no more than a facet of the generalized harm that occurs to the government as a whole. By the same token, the President's signing of the legislation is also nullified, judges, who might have felt otherwise, are bound by the decision, and citizens who relied upon or desired to have the law enforced are disappointed. Moreover, if the separate houses of Congress have standing, a challenger of a law would have to contend with fighting the United States itself, and separately defending himself against the Senate and the House of Representatives, each of which would be able to appear as a separate litigating party in the case.

Newdow, 313 F.3d at 499-500 (footnote omitted). The court accordingly denied the Senate's motion to intervene in the case (which involved a challenge to the phrase "under God" in the pledge of allegiance, as codified at 4 U.S.C. § 4). Notably, like the District Court did here, the court stated that "if the Senate wishes to have us deem its proposed brief to be an amicus brief and to consider it on that basis, we will do that." *Newdow*, 313 F.3d at 500.

We must examine whether, under Montana law, Legislators have standing in their capacity as legislators to intervene in an action challenging the constitutionality of legislation which has been duly passed by the Legislature—in this case, a referendum. We begin with the language of the Montana Constitution itself. "The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Mont. Const. art. III, § 1. The present action is a lawsuit against the State. "The attorney general is the legal officer of the state and shall have the duties and powers provided by law." Mont. Const. art. VI, § 4. Among those duties is the duty to defend all causes in which the State is a party. Section 2-15-501(1), (6), MCA. Correspondingly, the State must be served by delivering a copy of the summons and complaint to the Attorney General. M. R. Civ. P. 4(l). And a party that files a pleading, written motion, or other paper challenging the constitutionality of a state statute must promptly file a notice of constitutional question stating the question and identifying the paper that raises it, and serve the notice and paper on the Attorney General. M. R. Civ. P. 5.1(a).

We agree with the District Court that these constitutional provisions, statutes, and court rules establish that the defense of constitutional challenges, such as Plaintiffs make herein, is committed to the Attorney General, an agency of the Executive Branch. Members of the Legislative Branch do not have standing to intrude on this process, which is committed by the Montana Constitution to the Executive Branch. Mont. Const. art. III, § 1. More to the point of the intervention question, voting for legislation does not in itself create a legally

Legislators contend that the Attorney General will not "adequately represent" their interests. *See* M. R. App. P. 24(a)(2). Their specific reason for this assertion is that they raised and advocated (in their proposed Answer and in their Response Brief in Opposition to Motion for Summary Judgment) the severability provision of LR-119. Legislators indicate that the Attorney General failed to raise and argue this provision in his filings. However, we note that the District Court has indicated its willingness to consider this argument. Indeed, Legislators acknowledge that the severability issue received "significant attention" at the summary judgment hearing. Moreover, the District Court stated that Legislators could argue this matter in their amicus brief should they choose to file one.

Legislators also contend that they are "similarly situated" to Plaintiffs and that it would be "anomalous" to treat Legislators differently than Plaintiffs. Legislators, however, are not "similarly situated" to Plaintiffs in terms of entitlement to participate as a party in this action. Plaintiffs are parties to this action by virtue of the fact that they commenced it. In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder of necessary parties. *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91, 126 S. Ct. 606, 614 (2005). Plaintiffs did not name Legislators as parties. Legislators, conversely, seek to join this action—notably, over the objection of the Attorney General—through intervention. In order to do so, Legislators must satisfy the criteria of Rule 24. These principles are well established, and there is no "anomaly" in requiring Legislators to comply with Rule 24 in order to become a party to the action, even though Plaintiffs are not required to satisfy those same criteria.

We agree with the District Court that Legislators have failed to show that the Attorney General will not adequately represent their interests in his defense against Plaintiffs' challenge to LR-119. *See* M. R. Civ. P. 24(a)(2). As noted above, the District Court has considered the severability issue about which Legislators express concern, and the court has invited argument on that issue from Legislators in an amicus brief. Furthermore, we are not persuaded that the District Court abused its discretion in determining that Legislators' intervention would unduly delay or prejudice the adjudication of the original parties' rights.

See M. R. Civ. P. 24(c). We conclude that the motion to intervene as citizens and residents was, therefore, properly denied.

Having concluded that Legislators' motion to intervene was correctly denied with respect to their capacity as legislators and with respect to their interests as citizens and residents, we are not convinced that the District Court is proceeding under a mistake of law and causing a gross injustice.

If Legislators wish to participate in this action as amicus curiae, they may do so by filing an amicus brief in the District Court electronically by 9:00 a.m. Monday, March 19, 2012. The District Court has previously indicated that it would accept such filings.

Based on the foregoing,

IT IS ORDERED that Legislators' Petition for Writ of Supervisory Control is denied.

IT IS FURTHER ORDERED that the District Court's February 28, 2012 order on Legislators' motion to intervene is affirmed for the reasons stated herein.

IT IS FURTHER ORDERED that this case is remanded to the District Court for further proceedings consistent with this Order.

The Clerk of this Court is directed to give telephonic notice of this Order to counsel of record and to the Honorable James P. Reynolds, presiding District Court Judge, followed by electronic and U.S. mail.

Dated this 16th day of March, 2012.

Patricia Cotter

Jim Rice

Justices

Chief Justice Mike McGrath and Justice Brian Morris did not participate in this cause.